FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 116

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

ALBERT C. BICKFORD,
Attorney for Appellant,
120 Broadway,
New York 5, N. Y.

SUBJECT INDEX

	PAGE
Opinion Below and Prior Opinions	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	4
Substantiality of the Questions Presented	7

Appendix A

Opinion	10
Judgment	17

Table of Cases

Hughes v. *United States*, 342 U. S. 353	3
United States v. *Paramount Pictures Inc. et al.*, 334 U. S. 131 (and related citations)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

American Broadcasting-Paramount Theatres, Inc. (AB-PT) is appealing directly to this Court from a Judgment of the United States District Court for the Southern District of New York entered on March 24, 1958, modifying the Consent Judgment as to the Paramount Defendants entered in this action under date of March 3, 1949, and enjoining AB-PT from acquiring any beneficial interest in the Grove Theatre in Elgin, Illinois, without prior authorization by the District Court. Appellant submits this statement in accordance with Rule 15 of the Supreme Court of the United States to set forth the basis for this Court's

jurisdiction of the appeal. This statement is also submitted to demonstrate that the appeal presents substantial questions which require plenary consideration by this Court.

Opinion Below and Prior Opinions

The opinion of the District Court is not yet reported. Copies of the opinion and judgment of the District Court are attached hereto as Appendix A.

Earlier opinions in this case include the opinion of this Court immediately preceding the entry of the Consent Judgment, which is reported at 334 U. S. 131, and the prior opinion of the three-judge statutory District Court which is reported at 66 F. Supp. 323. Related matters are reported at 70 F. Supp. 53, 85 F. Supp. 881, and 339 U. S. 974.

Jurisdiction

The basic litigation which preceded the entry of the Consent Judgment was an anti-trust suit originally instituted in 1938. Amended complaints were filed in 1940 and again in 1945 charging violations of 15 U. S. C. Sections 1 and 2. The suit was tried before a three-judge statutory Court invoked by certificate filed by the Government under 15 U. S. C. Section 28.

The litigation terminated as to Paramount Pictures Inc. in a Consent Judgment entered by the three-judge Court on March 3, 1949. In the Consent Judgment the parties agreed that any future application to the Court under the judgment could be made to a single judge thereof, in lieu of the three judges composing the statutory Court (Section IXB). Consequently, when the government on February 5, 1958 made its present application for construction of the Con-

sent Judgment and an injunction, the application was heard and decided by a single judge.

Nine years after the entry of the Consent Judgment the government brought this proceeding in the District Court resulting in the entry on March 24, 1958 of the judgment which is the subject of this appeal. AB-PT's notice of appeal was filed in the District Court on April 22, 1958.

The jurisdiction of this Court to review the judgment of March 24, 1958 by direct appeal is conferred by 15 U. S. C. Section 29. This Court also has jurisdiction to review the judgment by direct appeal under 28 U. S. C. Section 1253.

The jurisdiction of this Court to entertain a similar appeal was sustained in *Hughes* v. *United States*, 342 U. S. 353 (1952).

Questions Presented

(1) Was there fair support for the District Court's reading into the provisions of the Consent Judgment a restriction on the right of appellant to acquire theatres as substantially equivalent replacements?

(2) Was there an adequate hearing on the issue of restricting appellant's right to acquire theatres as substantially equivalent replacements?

(3) Was it error for the District Court to enter the judgment below with no findings of fact to support it?

(4) Did the plaintiff sustain its burden of proof for the relief it was granted?

(5) Was the District Court's construction of Section III A 6(a)(i) of the Consent Judgment, as incorporated in Section III A 6(b), correct?

(6) Was it error for the District Court to enjoin appellant from acquiring any beneficial interest in the Grove Theatre in Elgin, Illinois and from operating said theatre without prior authorization of the Court?

Statement of the Case

On March 3, 1949 a Consent Judgment as to the Paramount Defendants was entered in the government's antitrust suit against the major motion picture distributors. Under the terms of the Consent Judgment, Paramount Pictures, Inc. was required to cause the formation of a "New Theatre Company" to take over its exhibition assets and to conduct future exhibition business in complete divorcement from Paramount's distribution activities. The judgment required the New Theatre Company (now AB-PT) to divest a number of Paramount's wholly-owned theatres, including one first-run theatre in Elgin, Illinois.

On March 3, 1949, when the Consent Judgment was entered, there were four theatres in Elgin: the Crocker, the Grove, the Rialto (all operated by Paramount), and the Starview (an independently operated drive-in). On October 1, 1950, AB-PT selected the Grove as the theatre to be divested under Section III C.1. of the Judgment and sold its lease to the property. AB-PT remained secondarily liable under the lease, however, and when, some time later, the purchaser defaulted, AB-PT was forced to repossess the Grove. This was on February 9, 1953. Subsequent efforts to find another purchaser were fruitless.

AB-PT was finally only able to divest itself of the Grove under an arrangement with the landlord whereby the lease was cancelled and AB-PT agreed to pay the landlord an amount equal to the monthly rental and other charges until November 30, 1970 (the termination date of the

lease), or until the premises were re-let. In the event of a re-letting, AB-PT agreed to pay the landlord $100 per month until 1970, regardless of the amount received on such re-letting. Notwithstanding the added inducement for the landlord to re-let, the theatre has not been re-let since the time of the cancellation of AB-PT's lease.

The Grove Theatre has been closed since its repossession on February 9, 1953. During the five years that the Grove (1099 seats) has been closed, three other theatres have been operating in Elgin: the Crocker, (1396 seats) the Rialto (921 seats) and the Starview. In July, 1957, the Starview's capacity was increased from 625 to 908 cars. At a conservative average of 2½ persons per car, this is the equivalent of 2,270 seats. Competitive bidding for first-run product was instituted in Elgin in 1949 at the request of the Starview. Following the institution of competitive bidding the Starview Theatre entered the first-run field in Elgin and since 1949 has been competing for first-runs of pictures.

On December 31, 1956, AB-PT's Rialto Theatre was completely destroyed by fire.

The destruction of the Rialto by fire was a contingency expressly provided for under Section III A 6(b) of the Consent Judgment, which incorporated by reference Section III A 6(a)(i) and permitted the New Theatre Company, AB-PT, to acquire a beneficial interest in "any theatre:"

> "(i) As a substantially equivalent replacement for wholly owned theatres held or acquired in conformity with this judgment which may be lost through physical destruction or conversion to non-theatrical purposes;"

Following the destruction of the Rialto Theatre by fire, AB-PT decided to replace it by leasing the previously

divested Grove Theatre, which had been closed for five years. AB-PT informed the government of its contemplated action and the government thereupon instituted this proceeding by a motion in the District Court for an order (1) "construing" Sections III A.6. and III C.1. of the Paramount Consent Judgment to the effect that American Broadcasting-Paramount Theatres, Inc. (AB-PT) might not acquire a previously divested theatre as a substantially equivalent replacement for another theatre, and (2) enjoining AB-PT from acquiring the Grove Theatre in Elgin, Illinois, by way of lease, in fee, or otherwise, or operating such theatre. Subsequently, during the course of the argument on the motion before the District Court, the government modified its request for relief to ask for a construction of the Consent Judgment permitting AB-PT to acquire a previously divested theatre as a substantially equivalent replacement, but only upon application to the Court and upon a finding by the Court that such acquisition would not unduly restrain competition.

The District Court made no findings of fact of any kind concerning the effect of the specific proposed acquisition by AB-PT of the Grove Theatre on the competitive situation in Elgin, or the effect of any general acquisition of previously divested theatres on the present competitive situation in the exhibition industry.

The District Court (consisting of one judge only, in accordance with Section IX B. of the Consent Judgment) took no testimony on the government's motion and considered no exhibits. Instead, the Court set the matter down for oral argument by counsel, following which it filed its opinion granting the government's motion as modified. Copies of the opinion, and the judgment entered upon it, are annexed hereto as Appendix A.

Thus nine years after the entry of the Consent Judgment, and without hearing any testimony or making any finding of facts, the District Court has substantially modified the Consent Judgment by imposing a wholly new restriction on the right of AB-PT to acquire substantially equivalent replacements for theatres which have been lost through physical destruction. Under the terms of the Consent Judgment AB-PT was free to make such replacements without court approval. The District Court has now carved out from this right, all potential replacement theatres which previously were subjects of divestiture. In addition, the judgment specifically enjoined AB-PT from acquiring any beneficial interest in the Grove Theatre in Elgin, Illinois without separate formal application to and prior authorization by the Court.

Substantiality of the Questions Presented

The judgment of the Court below contains a permanent injunction prohibiting AB-PT from acquiring the Grove Theatre in Elgin, Illinois, without prior court authorization. The judgment also contains a blanket prohibition against replacing any theatre lost, through physical destruction or conversion to non-theatrical purposes, with a previously divested theatre, without prior court approval.

The District Court's injunction against the acquisition by AB-PT of the Grove Theatre may well force AB-PT to construct a brand new theatre on the site of the burned-out Rialto in Elgin, Illinois. This would result in patent economic waste. The City of Elgin will suffer the continued presence of the derelict Grove Theatre in the center of its business district. The owner of the Grove will continue to have her building deteriorate through non-usage (since it is unlikely, in view of conditions in the motion picture

industry, that anyone else will ever take over the operation of the Grove) and AB-PT will not only have to expend a large sum to construct a new theatre, but in all likelihood will be obligated to continue to pay the full annual charges of over $7,000 a year until November 30, 1970, in accordance with the continuing obligations connected with its divestiture of the Grove Theatre.

The questions surrounding the propriety of the injunction itself, therefore, are plainly substantial in terms of the economic effect on the community of Elgin, and in terms of the actual sums of money involved.

Of potentially greater importance, however, is the sweeping modification of the Consent Judgment effected by the District Court's judgment. Prior to the entry of the judgment below, AB-PT had the right under the terms of the Consent Judgment to acquire "any theatre" as a substantially equivalent replacement for one that had been destroyed or commercialized. It was free to do so as a matter of regular business judgment with no requirement of an expensive and extended judicial proceeding. Under the terms of the District Court's judgment this has all been changed. AB-PT now is compelled to bring a plenary proceeding in the District Court in New York to prove by witnesses, documents and other competent evidence that a proposed replacement, no matter where it is or what the circumstances, will not unduly restrain competition. This modification of the Consent Judgment imposes a new obligation on AB-PT which is burdensome, expensive and time-consuming. By the time the full judicial process involved in court application has been completed, many months could elapse. The economic burden of waiting this length of time, not knowing whether to enter into the expensive commitments needed to rebuild a lost theatre, obviously can be so great that in many situations AB-PT would be

forced to rebuild rather than undergo the additional economic loss involved in awaiting a judicial decision.

The District Court's judgment, with its substantial modification of the Consent Judgment, over nine years after the entry thereof, and the injunction against the acquisition of the Grove Theatre, was entered purely on the basis of the legal arguments put forth by the government. The court conducted no inquiry, and the moving party offered no proof, as to whether the contemplated replacement of the Rialto Theatre in Elgin would have any adverse effect on the present competitive situation. Moreover, the court entered no findings of fact whatsoever to support its blanket construction of the Consent Judgment, which extends to every future case of the same character. Clearly, the appeal from the District Court's judgment presents substantial questions both as to the immediate rights of the parties in Elgin, Illinois, and as to the future rights of AB-PT to acquire replacements for theatres lost through accident or commercialization.

Respectfully submitted,

ALBERT C. BICKFORD,
Attorney for Appellant,
American Broadcasting-
Paramount Theatres, Inc.,
120 Broadway,
New York 5, N. Y.

APPENDIX A

The District Court made no findings of fact or conclusions of law.

Opinion

United States District Court

SOUTHERN DISTRICT OF NEW YORK

EQUITY 87-273

UNITED STATES OF AMERICA

against

PARAMOUNT PICTURES, INC., *et al.*

APPEARANCES:

MAURICE SILVERMAN, Esq. and MAURICE BINKOW, Esq., Attorneys, Department of Justice, Washington, D. C., Attorneys for United States of America.

SIMPSON, THACHER & BARTLETT, Esqs., New York, N. Y., Attorneys for American Broadcasting-Paramount Theatres, Inc.; ALBERT C. BICKFORD and WHITNEY NORTH SEYMOUR, JR., Esqs., of Counsel.

PALMIERI, J.

The United States moves for an order construing the Consent Judgment as to the Paramount Defendants, dated

March 3, 1949, as modified (Judgment) and for an order enjoining defendant American Broadcasting-Paramount Theatres, Inc. (AB-PT) from taking certain actions alleged to be inconsistent with that judgment.

The motion is brought pursuant to Section IX C. of the Judgment whereby jurisdiction is retained to enable any of the parties to apply to the Court at any time for orders or directions "necessary or appropriate for the construction, modification or carrying out of the [Judgment or] • • • for the enforcement of compliance therewith. • • •"

The facts from which the motion arises are not in dispute. At the time the Consent Judgment was entered as to the Paramount defendants, there were three conventional theatres in Elgin, Ill., all operated by Paramount, namely, the Grove, Crocker and Rialto Theatres. In addition, there was an independent drive-in theatre, the Starview Outdoor Theatre, which was closed for several months of each year. The Starview offered the only competition of any kind to Paramount. In compliance with Section III. C. 1. of the Judgment, quoted *infra*, AB-PT divested the Grove Theatre in October 1950. In 1953 it repossessed this theatre because of defaults by the purchaser of its lease and in 1955 it again divested by making financial arrangements with the owner of the fee. The Grove Theatre has not been operated since 1953. The Starview has continued to operate and since 1949 has shown first-run pictures.

In 1956, the Rialto Theatre was destroyed by fire, leaving AB-PT with only its Crocker Theatre operating. AB-PT now seeks to replace the Rialto by reacquiring the

Grove, asserting its right to do so under Section III. A. 6. (b) of the Judgment[1] which authorizes it, without Court authorization, to replace a theatre which has been physically destroyed or converted to other uses.

The issue before me, essentially, is whether the previously divested Grove Theatre can now be availed of as a "substantially equivalent replacement" for the destroyed Rialto Theatre, within the intendment of the Judgment. I do not believe that it can. Such a reacquisition can only be effected, in my opinion, with permission of the Court, and upon an appropriate showing that it will not unduly restrain competition.

I do not believe any useful purpose can be served by a detailed, word by word analysis of the provisions of the Judgment. The Judgment neither specifically permits nor prohibits reacquisition of a divested theatre to replace one

---

[1] Section III. A. of the Judgment enjoins defendant AB-PT:

"6. From acquiring a beneficial interest in any theatre other than those named in paragraph 9 hereof, provided that:

"(a) Until the joint ownerships set forth in paragraph 9 have been completely terminated as provided for in said paragraph, beneficial interests in theatres may be acquired

"(i) As a substantially equivalent replacement for wholly owned theatres held or acquired in conformity with this judgment which may be lost through physical destruction or conversion to non-theatrical purposes;

* * *

"(b) After termination of the joint ownerships set forth in paragraph 9 hereof, Paramount or the New Theatre Company may acquire a beneficial interest in any theatre only in the situations covered by paragraphs (i) and (ii) of the preceding subsection (a) unless the New Theatre Company shall show to the satisfaction of the Court, and the Court shall first find, that the acquisition will not unduly restrain competition." (Footnote omitted)

which AB-PT retained under the Judgment.[2] The defendant contends that since the permission granted in Section III. A. 6. (b), *supra*, to acquire "any theatre" for replacement purposes was without restriction, there was an intentional omission of any prohibition against reacquiring divested theatres, and that this omission was designed to permit the reacquisition the defendant here asserts its right to effect. But the limitation can be spelled out from the basic purpose of the divestiture provisions of the Judgment. That purpose permeates the entire fabric of the Judgment and is set forth in its preamble, at page 2:

> "The Paramount defendants, have represented to the plaintiff and to this Court that they propose, for the purpose of avoiding discrimination against other exhibitors and distributors, *promoting substantial independent theatre competition for the Paramount theatres and promoting competition in the distribution and exhibition of films generally*, (1) to divorce their domestic exhibition business from their production and distribution business, (2) to divest Paramount Pictures Inc. and the divorced exhibition business of all interest in a minimum of 774 theatres, and (3) to subject themselves and said divorced distribution and exhibition businesses to injunctive provisions, all as hereinafter set forth: • • •" (emphasis added.)

Moreover, Section III. C. 1. of the Judgment provides as follows:

---

[2] The plaintiff contended generally that such a reacquisition was prohibited by Section III. C. 1. of the Judgment, quoted *infra*. While the plaintiff did not point to particular language in that section in support of its contention, it should be noted that the section required disposition of one theatre in Elgin, Ill., "to a party not a defendant herein." It was pursuant to this section that AB-PT divested the Grove.

> "*For the purpose of creating substantial motion picture theatre operating competition in the communities hereinafter listed,* Paramount or the New Theatre Company shall dispose of all of the interest of Paramount in at least one half of the following motion picture theatres within one year from the date hereof, and in all of the following motion picture theatres within two years from the date hereof, and each such disposition shall be to a party not a defendant herein or owned or controlled by or affiliated with a defendant herein:
>
> • • •
>
> "One first run theatre in Elgin, Ill. • • •" (Emphasis added.)

Indeed, it was conceded by the defendant upon the argument that the judgment was intended to create competition in the area in question.[3]

The provisions of the Judgment above quoted are basic to the purposes and terms of the Judgment and particularly of its divestiture provisions. These must be read in the light of the express intendment—that of creating competition or opportunities for competition with the defendant in the public interest. The replacement provision relied upon by the defendant relates as much to a theatre property lost by fire as it does to one converted to non-theatrical purposes. Thus, and without intending in any way to impugn the *bona fides* of the defendant here, the provision invoked could become a readily usable device for the re-creation of monopoly situations through the re-acquisition of the very theatres previously divested in order to eliminate monopoly situations. For instance, under the construction of the Judgment urged by the

[3] See Record p. 21.

defendant, the defendant could reestablish its monopoly position in any city by converting a theatre which it has continued to operate, to non-theatrical purposes, and then reacquiring a previously divested theatre. And this could be done without any prior authorization by the Court. To recognize a unilateral uncontrolled right of a defendant to undo what the Judgment clearly intended, would, under these circumstances, constitute a stultification of its express purposes. The effect of the exercise of such a right on the particular competitive situation in Elgin, Ill., is, of course, irrelevant on this motion which calls for a construction of the Judgment's provisions which would be applicable regardless of what the competitive situation might be in Elgin or elsewhere. Whatever the private interest may be in reacquiring a previously divested theatre without prior Court approval, it must give way to the overriding purpose of creating and promoting substantial independent competition for the defendants.

While I am not overlooking the fact that the Grove Theatre has remained idle and unused for some time, this cannot affect the meaning of Section III. A. 6. (b) of the Judgment, or the defendant's right to invoke it. This being said, the door to reacquisition is not shut. Since the defendant is asserting a right to reacquire the Grove without prior Court approval, there is not now before the Court any appropriate inquiry into the competitive situation in Elgin, Ill., and I express no opinion on that situation. If, however, the defendant should petition the Court for authorization to reacquire the previously divested Grove Theatre, the way to such an inquiry would be opened, and it would thereupon be incumbent upon the

defendant to show that the proposed reacquisition would not unduly restrain competition.

Accordingly, the plaintiff's motion is granted. The permission contained in Section III. A. 6. (b) of the Judgment to replace lost theatres without Court approval does not extend to their replacement with previously divested theatres. The plaintiff is directed to submit an order, on notice, construing the Judgment in a manner consonant herewith and enjoining the defendant from reacquiring, without Court order, the Grove Theatre at Elgin, Illinois. This decision is without prejudice to a petition by the defendant, under Section III. A. 6. (b) of the Judgment, for permission to reacquire the Grove Theatre.

Dated: New York, N. Y.
March 13, 1958

EDMUND L. PALMIERI
Edmund L. Palmieri
U. S. D. J.

Judgment

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

EQUITY NO. 87-273

UNITED STATES OF AMERICA,
Plaintiff,

v.

PARAMOUNT PICTURES INC., *et al.*,
Defendants.

ORDER

This Court on March 3, 1949, having made and entered a Consent Judgment in this action as to the Paramount defendants therein; and United Paramount Theatres, Inc. (now known as American Broadcasting Paramount Theatres, Inc. which is hereinafter referred to as AB-PT) referred to as the New Theatre Company in the said Consent Judgment, on December 15, 1949, having filed its consent to be bound by, and receive the benefits of, Sections III, IV, VI, VIII, and IX of the said Consent Judgment; and Section III C.1. of the Consent Judgment having required the New Theatre Company to divest itself of theatres in various cities and towns, including one first run theatre in Elgin, Illinois; and it appearing that AB-PT, having divested the Grove Theatre in Elgin, Illinois as a compliance with Section III C.1. of the said Consent Judgment with respect to that community, intends to reacquire the said Grove Theatre as a substantially equivalent re-

placement for the Rialto Theatre in Elgin which has been destroyed by fire and has contended that such reacquisition is authorized by Section III A 6(a) (i) as incorporated in Section III A 6(b) of said Judgment; and plaintiff having applied to this Court for an order construing Sections III C.1. and III A 6 of the said Consent Judgment to the effect that a theatre divested may not be reacquired as a substantially equivalent replacement for another theatre under Section III A 6, and for an order enjoining AB-PT from reacquiring or operating the Grove Theatre in Elgin, Illinois,

NOW, THEREFORE, on reading the motion of the plaintiff dated February 5, 1958, the affidavit of Maurice Silverman, verified February 4, 1958, the affidavit of Sidney M. Markley, verified February 17, 1958, and the memoranda in support of, and in opposition to plaintiff's motion, and counsel for plaintiff and AB-PT having been heard, it is hereby

ORDERED, ADJUDGED AND DECREED that:

1. The permission contained in Section III A 6(a)(i) as incorporated in Section III A 6(b) of the Judgment to acquire without Court approval substantially equivalent replacements for wholly owned theatres which may be lost through physical destruction or conversion to non-theatrical purposes does not extend to their replacement with previously divested theatres.

2. AB-PT is enjoined from acquiring any beneficial interest in the Grove Theatre in Elgin, Illinois, and from operating said theatre, without the prior authorization of the Court.

3. This order is without prejudice to AB-PT to petition this Court under Section III A 6(b) of the Judgment for permission to reacquire the Grove Theatre upon a showing to the satisfaction of the Court, and provided the Court shall first find, that the acquisition will not unduly restrain competition.

Dated March 24, 1958.

EDMUND L. PALMIERI
Edmund L. Palmieri
United States District Judge